In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1550

MOSS DAVID POSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of knowingly refusing to submit to induction into the Armed Forces of the United States, in violation of 50 U.S.C. App. 462. He was sentenced to imprisonment for three years.

Petitioner, now a doctor, registered with his local Selective Service board in 1954. On May 12, 1966 (after a series of student and occupational defer-

ments), he was reclassified from II-A (occupational deferment) to I-A (available for military service). He requested a personal appearance and appeal, claiming entitlement to a III-A classification (hardship deferment) (SSF 109).[1] In support of this claim, he told the board that his wife's parents were medically disabled and dependent upon him (SSF 137-138). On September 21, 1966, the local board reclassified him III-A; the State director thereafter appealed this classification (SSF 144). On November 17, 1966, the State appeal board reclassified petitioner I-A by a 3-0 vote (SSF 151).

On March 13, 1967, the local board sent petitioner an order to report for induction on July 6, 1967 (SSF 172). The following day the board received a telegram from petitioner requesting a Form 150, the special form for conscientious objectors (SSF 173). Petitioner had never before given any intimation to the board that he possessed conscientious objector beliefs. On April 27, 1966, October 26, 1966, and again on January 16, 1967, petitioner had inquired as to whether he would be permitted to join the California National Guard (SSF 101, 148, 161).

On March 15, 1967, the local board mailed the form to petitioner. It was returned filled out on March 29, 1967 (SSF 174). On April 3, 1967, the local board rejected the conscientious objector claim, expressly finding that petitioner's beliefs after the induction

[1] "SSF" refers to petitioner's Selective Service File, a copy of which we are lodging with the Clerk of this Court.

notice "were no different than before" and that he was not "a genuine Conscientious Objector" (SSF 179). After notice that the local board had refused to reopen his classification, petitioner wrote to the board that his beliefs "were not formulated nor crystallized until after the induction notice was received" (SSF 183). At petitioner's request the local board granted a courtesy interview; at this appearance petitioner was told that he would have all the time he needed to present his case (SSF 271) and that the board was trying to determine the point at which his conscientious objector beliefs crystallized (SSF 214, 215, 217). Petitioner devoted his entire appearance, lasting two hours and thirty-five minutes, to reading prepared statements (SSF 214-216). Thereafter, the local board declined to reopen his I-A classification.

The court of appeals affirmed the conviction (Pet. App. A1-A5). It found "a basis in fact for the board's determination that [petitioner's] beliefs upon which he based his conscientious objection were in existence before he received the induction order" (Pet. App. A5).[2] In view of this determination, the court found that the issues presented in *Welsh* v. *United*

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[2] The court of appeals observed that petitioner's "almost instant reaction to the [induction] notice warranted the board's discounting of [his] statement that he had only 'started thinking' about the matter prior to receiving the notice, and its conclusion that his conscientious objection was firmly held before the notice reached him" (Pet. App. A5). The court also pointed out that petitioner's "Form 150, * * * and a supporting letter, contain statements suggesting that [petitioner] had entertained his conscientious objections to war for some time" (*ibid.*).

States, No. 76, 1969 Term, decided June 15, 1970, and *Ehlert* v. *United States*, No. 1383, 1969 Term, certiorari granted, May 4, 1970, were not relevant to the disposition of the instant case (Pet. App. A-4). The court also found a basis in fact to support the rejection of petitioner's claim of hardship deferment.[3]

Petitioner's claim to classification as a conscientious objector was rejected under 32 C.F.R. 1625.2, which provides that a local board shall not reopen a registrant's classification after an induction notice has been sent, unless the board specifically finds that there has been a change in his status resulting from circumstances over which he has no control. This provision has uniformly been interpreted as not allowing re-

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[3] The court set forth the facts upon which it relied (Pet. App. A2, n.1):

"(1) Posner's father-in-law and mother-in-law, Mr. and Mrs. Rubenstein, did not live with Posner; (2) the Rubensteins had been and were 'still quite active in the community when they are able . . .'; (3) Mr. Rubenstein received $155 a month from his veteran's pension and social security; (4) Mrs. Rubenstein was to receive a 'small settlement' from her previous employer because of an injury she had suffered; (5) Posner's contribution to the Rubensteins was fifty dollars a month until July, 1966, when he began contributing one hal. of their support; (6) part of the Rubensteins' expenses were for medical expenditures, and Posner 'thought' they were eligible for Medicare (Mr. Rubenstein was sixty-seven years old, and Mrs. Rubenstein was sixty-two years old); and (7) while Posner told the board members that the Rubensteins had so many medical problems that only he could recommend treatment for them, Dr. Nolan Resnich had been treating Mr. Rubenstein at the Veterans' Administration Hospital in Long Beach, California for several years, and Dr. R. H. Schumacher, Mrs. Rubenstein's physician, was apparently familiar with her medical problems."

opening unless the registrant's change in status occurred *after* receipt of the induction notice. *United States* v. *Kanner*, 416 F. 2d 522, 525 (C.A. 9); *Dugdale* v. *United States*, 389 F. 2d 482, 484 (C.A. 9); *United States* v. *Griffin*, 378 F. 2d 899 (C.A. 2); *United States* v. *Kroll*, 400 F. 2d 923 (C.A. 3), certiorari denied, 393 U.S. 1069; *United States* v. *Helm*, 386 F. 2d 434 (C.A. 4), certiorari denied, 390 U.S. 958; *Nelloms* v. *United States*, 399 F. 2d 295 (C.A. 5); *United States* v. *Taylor*, 351 F. 2d 228 (C.A. 6); *United States* v. *Porter*, 314 F. 2d 833 (C.A. 7); *Salamy* v. *United States*, 379 F. 2d 838 (C.A. 10).

Initially, we point out that the court below properly concluded that the local board could justifiably find petitioner's conscientious objection (if it existed at all) to have crystallized *prior* to receipt of an induction notice. Despite their disagreement on the late crystallization issue, the various courts of appeals are in accord that in this situation, when a timely claim is not made, exemption may be denied on that basis alone. *United States* v. *Gearey*, 368 F. 2d 144 (C.A. 2), certiorari denied, 389 U.S. 959; *Davis* v. *United States*, 374 F. 2d 1 (C.A. 5); *United States* v. *Taylor*, 351 F. 2d 228 (C.A. 6); *United States* v. *Beaver*, 309 F. 2d 273 (C.A. 4), certiorari denied, 371 U.S. 951; *United States* v. *Kanner*, 416 F. 2d 522 (C.A. 9); *Boyd* v. *United States*, 269 F. 2d 607 (C.A. 9); *Keene* v. *United States*, 266 F. 2d 378 (C.A. 10); *United States* v. *Schoebel*, 201 F. 2d 31 (C.A. 7). We recognize, however, that this Court has recently granted certiorari in *Ehlert* v. *United States*, No. 1383, 1969

Term,[4] to consider whether the maturation of conscientious objector beliefs after the receipt of an induction notice constitutes a circumstance beyond the control of the registrant entitling him to reopening.[5]

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[4] While petitioner suggests that the dissent in *Ehlert* stands for the proposition that Congress, in creating the conscientious objector classification, "nowhere, even by implication, set a deadline for its implementation" (Pet. 9), this is a misreading of the dissent, which in fact expressed concern that a claim be timely made. It recognized that "the enforcement of orderly procedures may well require default to be imposed for failure of a registrant to claim in timely fashion" and that in evaluating a conscientious objector claim the board must consider whether the belief "did in fact crystallize after receiving notice of induction and thus constitute a change in status" (No. 21,930 (C.A. 9), slip op., p. 11).

[5] Petitioner contends that he is a non-religious conscientious objector and that denial of his C.O. claim for lack of religiosity violates the First Amendment. He also argues that the granting of a courtesy interview by his local board constituted a de facto reopening of his classification. However, the situation here is factually distinguishable from those involved in the recently decided cases of *Welsh* v. *United States*, *supra*, and *Mulloy* v. *United States*, No. 655, 1969 Term, decided June 15, 1970, and there is no occasion to vacate petitioner's conviction and remand the case for reconsideration in light of those decisions. In our view, both *Welsh* and *Mulloy* presuppose a properly presented and timely tendered claim of C.O. status, and therefore nothing in those decisions is contrary to the result reached below here, since petitioner's C.O. claim was admittedly filed after he had been ordered to report for induction, while his C.O. beliefs (if any) arose prior to that time.

Similarly, petitioner's claim that "it is virtually impossible" to obtain a non-jury trial in the Central District of California without waiving the right to special findings (Pet. 33, n.9) has no support in the record. It was not urged upon either the district court or the court of appeals and is unsupported by anything beyond petitioner's mere allegation.

In view of that fact, the Court may wish to defer action on the instant petition pending its decision in *Ehlert*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

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